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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE RAY GARCIA,

Defendant and Appellant.

H034421

(Santa Clara County

Super. Ct. No. CC933077)

Defendant Jesse Ray Garcia pleaded no contest to one count of felony hit and run involving bodily injury (Veh. Code, § 20001, subds. (a) & (b)(1)). Pursuant to the terms of his plea agreement, he was placed on probation for three years, and ordered to serve 120 days in county jail. Among other fines and fees, Garcia was ordered to pay \$300 in attorney fees, pursuant to Penal Code section 987.8,¹ as well as probation supervision fees “not to exceed \$64 per month.” The trial court also imposed various probation conditions, which included prohibitions on Garcia “possess[ing] or consum[ing] alcohol or illegal drugs,” and “possess[ing] any firearm or ammunition.”

On appeal, Garcia contends that there was insufficient evidence to support an imposition of attorney fees, and that the trial court erred in requiring him to pay probation supervision fees as a condition of probation. Garcia further argues that the probation conditions precluding him from possessing or consuming alcohol or illegal drugs and

¹ All further unspecified statutory references are to the Penal Code.

possessing firearms or ammunition are unconstitutionally vague and overbroad due to the absence of an express knowledge requirement.

We find that there was sufficient evidence to support the order directing the payment of attorney fees, but agree that it is not clear whether or not the order made the payment of probation supervision fees a condition of probation. We also agree that the challenged probation conditions must be modified to incorporate an express knowledge requirement. We shall therefore remand the matter to the trial court with directions to delete that portion of the order granting probation which directs payment of a probation supervision fee as a condition of probation, and to enter a separate order pursuant to section 1203.1b, directing the payment of such a fee. We shall also direct the trial court to modify the probation conditions to impose an explicit knowledge requirement.

I. FACTUAL² AND PROCEDURAL BACKGROUND

On January 29, 2009, a felony complaint was filed in the Santa Clara County Superior Court alleging that Garcia was involved in a hit-and-run accident on January 25, 2009, causing bodily injury to another person in violation of Vehicle Code section 20001, subdivisions (a) and (b)(1). On May 5, 2009, Garcia entered a plea of no contest to that charge pursuant to an agreement that he would be sentenced to 120 days in county jail. Garcia waived time for sentencing and waived referral to the probation department.

At the June 26, 2009 sentencing hearing, the court sentenced Garcia to three years' probation and ordered him to serve 120 days in county jail. Garcia asked to have his surrender date delayed because his wife worked full-time and he was the primary caregiver for his children during the summer. The trial court granted his request and ordered Garcia to surrender on September 11, 2009. Garcia was ordered to pay probation

² Because there was no preliminary hearing or trial and Garcia waived referral to the probation department, the record on appeal contains very little information about the facts of the underlying offense beyond those set forth in the felony complaint.

supervision fees not to exceed \$64 per month, and after confirming that Garcia was employed, the trial court further ordered that he pay \$300 in attorney fees under section 987.8. Among other probation conditions, Garcia was ordered not to “possess or consume alcohol or illegal drugs or knowingly go anyplace where illegal drugs are used or sold or alcohol is a major item of sale,” and “not to possess any firearm or ammunition for the rest of your life.”

Garcia timely appealed.

II. DISCUSSION

A. Attorney fees

Garcia argues that there was insufficient evidence to support the order requiring him to pay attorney fees of \$300 pursuant to section 987.8 and thus the order must be reversed.

The Attorney General contends that the evidence was sufficient because a finding of ability to pay could be implied from several factors, including the fact that both Garcia and his wife were employed, and because Garcia would be out of custody--and thus capable of earning a wage--for approximately two-and-a-half months before he would have to begin serving his sentence.

The court’s authority to order a defendant who has received legal assistance at public expense to pay all or part of the cost is set forth in section 987.8. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1213.) “In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof.” (§ 987.8, subd. (b).) “If the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county.” (*Id.* at subd. (e).)

A finding that a defendant has the present ability to pay is a prerequisite to an order to pay attorney fees under section 987.8. “ ‘Ability to pay’ means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant’s present financial position. [¶] (B) The defendant’s reasonably discernable future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant’s reasonably discernable future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernable future financial ability to reimburse the costs of his or her defense. [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant’s financial capability to reimburse the county for the costs of the legal assistance provided to the defendant.” (§ 987.8, subd. (g)(2).)

A determination that a defendant has a present ability to pay need not be express, but may be implied through the content and conduct of the hearing. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 71.) Whether express or implied, the attorney’s fee order cannot be upheld on appeal unless it is supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347.)

At the sentencing hearing, Garcia confirmed that he was working. No contrary evidence appears in the record, and the trial court could properly rely on this admission. Although Garcia was ordered to serve 120 days in jail, his jail sentence was delayed until September 2009 (approximately three months), principally to accommodate the fact that he was the primary caregiver for his children during the summer because his wife worked full-time. The trial court could have reasonably concluded that, with both Garcia and his wife working during the time between the June 2009 sentencing hearing and his September 2009 surrender date, Garcia would have the ability to pay the nominal amount

of \$300. The court's order regarding attorney fees is therefore supported by substantial evidence.

B. Probation supervision fee

Garcia also complains that the trial court allegedly required him, *as a condition of probation*, to pay a probation supervision fee of up to \$64 per month. He concedes that such a fee may properly be ordered, but asserts that because the court recited it along with the other conditions of probation, it is unclear whether or not the trial court was including the payment of this fee as a condition of probation. He also asserts that, prior to ordering him to pay this fee, the trial court should have first determined that he had the ability to pay it.

The Attorney General contends that, by failing to raise an objection below, Garcia has waived any objection to the probation supervision fee based on the trial court's alleged failure to first find that he had the ability to pay that fee, citing *People v. Valtakis* (2003) 105 Cal.App.4th 1066. Alternatively, the Attorney General argues that the record makes clear that the probation supervision fee was not ordered as a condition of probation, and because both Garcia and his wife were working, there was sufficient evidence to support the trial court's implied finding that Garcia could pay the fee.

The general rule is that a condition of probation cannot be challenged on appeal unless objected to at the time of sentencing. (*People v. Welch* (1993) 5 Cal.4th 228, 235; *People v. Valtakis, supra*, 105 Cal.App.4th at p. 1071.) However, the California Supreme Court has established an exception to the rule that only “ ‘claims properly raised and preserved by the parties are reviewable on appeal’ ” for claims of unauthorized sentences or sentences entered in excess of jurisdiction. (*People v. Smith* (2001) 24 Cal.4th 849, 852.) “Because these sentences ‘could not lawfully be imposed under any circumstances in the particular case’ [citation], they are reviewable ‘regardless of whether an objection or argument was raised in the trial and/or reviewing court.’ ” (*Ibid.*) Here, Garcia asserts that the trial court does not have the authority to require payment of a probation

supervision fee without first determining his ability to pay, nor could it lawfully have made payment of that fee a condition of probation. Since these are challenges to the legality of the fee, Garcia may raise these issues for the first time on appeal.

1. Sufficiency of the evidence to support probation supervision fee

As to the claim that there was insufficient evidence to support a finding that Garcia had the ability to pay the fee, we have already found in section II.A., *ante*, that there was sufficient evidence to support the court's order directing the payment of attorney fees. Accordingly, since there was substantial evidence that Garcia, who was employed and whose wife also had a full-time job, could pay \$300 in attorney fees, there was substantial evidence that he could pay \$64 per month in probation supervision fees.

2. Probation supervision fees may not be a condition of probation

Section 1203.1b authorizes the trial court to make an order directing a defendant to pay the costs of probation.³ It is settled that probation supervision costs imposed under

³ Section 1203.1b provides, "(a) In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report, whether or not probation supervision is ordered by the court, and in any case in which a defendant is granted probation or given a conditional sentence, the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision or a conditional sentence, of conducting any preplea investigation and preparing any preplea report pursuant to Section 1203.7, of conducting any presentence investigation and preparing any presentence report made pursuant to Section 1203, and of processing a jurisdictional transfer pursuant to Section 1203.9 or of processing a request for interstate compact supervision pursuant to Sections 11175 to 11179, inclusive, whichever applies. The reasonable cost of these services and of probation supervision or a conditional sentence shall not exceed the amount determined to be the actual average cost thereof. A payment schedule for the reimbursement of the costs of preplea or presentence investigations based on income shall be developed by the probation department of each county and approved by the presiding judge of the superior court. The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative, (continued)

section 1203.1b “may not be a condition of probation as the costs are collateral and the statute itself provides for enforcement of the order by civil collection.” (*People v. Hart* (1998) 65 Cal.App.4th 902, 907.) Where such costs are erroneously made a condition of probation, the proper remedy is to “delete the order to pay costs of probation from the conditions of probation, [and make] it simply an order entered at judgment.” (*Ibid.*)

In this case, the record does not make clear whether or not the probation supervision costs were ordered separately or as a condition of Garcia’s probation. The sentencing memorandum prepared by the probation department sets forth a litany of sentencing recommendations, the majority of which appear to be probation conditions, though they are not expressly labeled as such. The probation supervision fee appears twice, first as recommendation No. 21 and again as recommendation No. 22,⁴ with the following paragraph in between: “In addition to the above orders of probation, the Court hereby orders the following fees, *which are not conditions of probation*, however, are separately due to the Department of Revenue during the period of probation. [*Sic.*] The failure to pay such fees will result in civil collection and potential loss of the California Drivers License.” (Italics added.) Consequently, recommendation No. 21, which precedes the above-quoted language, is a condition of probation. Recommendation No. 22, which follows it, is not.

shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant’s ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant’s ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver.”

⁴ The language of recommendation Nos. 21 and 22 is identical: “A Probation Supervision Fee not to exceed \$64.00 per month be imposed pursuant to Section 1203.1b of the Penal Code.”

At the sentencing hearing itself, the trial court recited a number of orders from the sentencing memorandum, but never expressly stated which of these were conditions of Garcia's probation and which of them were not. However, in the sentencing memorandum itself, recommendation No. 22 has been lined-out,⁵ which leaves the impression that the trial court adopted recommendation No. 21, giving rise to the inference that the probation supervision fee was imposed as a condition of probation. As discussed above, a probation supervision fee may not be made a condition of probation.

Accordingly, the order granting probation must be modified to delete the order to pay costs of probation from the conditions of probation, making it simply an order entered at judgment which may then be enforced as permitted in the relevant statutes. (*People v. Hart*, *supra*, 65 Cal.App.4th at p. 907.)

C. Probation conditions

Garcia challenges the constitutionality of two of the probation conditions imposed: (1) the condition that "he not possess or consume alcohol or illegal drugs"; and (2) the condition that he not "possess any firearm or ammunition" for the remainder of his life. He claims that these conditions, because they lack an express knowledge requirement, are vague and overbroad and must be modified to add such a requirement.

The Attorney General counters that modification of these probation conditions is unnecessary, since they are sufficiently precise and tailored to the purposes served.

The rules pertaining to probation conditions are well established. "Trial courts have broad discretion to set conditions of probation in order to 'foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1.'" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; see § 1203.1, subd. (j); Cal. Rules of Court, [former] rule

⁵ No initials or name appear next to this interlineation, so we do not know who crossed out this provision--the trial judge, the probation officer, the clerk or some other person.

410 [renumbered rule 4.410, eff. Jan. 1, 2001].) If it serves these dual purposes, a probation condition may impinge upon a constitutional right otherwise enjoyed by the probationer, who is ‘not entitled to the same degree of constitutional protection as other citizens.’ (*People v. Peck* (1996) 52 Cal.App.4th 351, 362.)” (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.)

However, a “probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890, quoting *People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.) Garcia claims that, without an express knowledge requirement, a court could find that he violated probation if he were to drink punch at a party without knowing someone had spiked it with alcohol or if he were to eat a brownie without knowing it had been baked with marijuana as one of the ingredients. He could also be found in violation for owning a firearm even if he actually believed the item in question was a cap gun or an antique weapon incapable of being fired.

Though we believe it is unlikely that any of the scenarios described by Garcia would actually come to pass, we agree that the probation conditions as currently phrased would put Garcia at risk of violating probation if he were to somehow inadvertently imbibe alcohol, ingest illegal drugs or come into the possession of a real firearm. Consequently, without an express requirement of knowledge, the two probation conditions challenged by Garcia are unconstitutionally vague. (*In re Sheena K.*, *supra*, at p. 891.) The conditions must therefore be modified to impose an explicit knowledge requirement.

III. DISPOSITION

The matter is remanded to the trial court to delete that portion of the order granting probation directing Garcia to pay a probation supervision fee as a condition of probation,

and to enter a separate order pursuant to Penal Code section 1203.1b, directing the payment of such a fee.

The trial court is also directed to restate the probation conditions regarding alcohol, illegal drugs, firearms and ammunition, as follows:

1. “You are ordered not to knowingly possess or consume alcohol or illegal drugs or knowingly go anyplace where illegal drugs are used or sold or alcohol is a major item of sale.”

2. “You are ordered not to knowingly possess any firearm or ammunition for the rest of your life.”

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.